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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

Nos. 17 and 18

INTERSTATE COMMERCE COMMISSION,
U.S.A.C. TRANSPORT, INC.,

COMMON CARRIER CONFERENCE—IRREGULAR ROUTE,
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,

AND

REGULAR COMMON CARRIER CONFERENCE
OF AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellants

v.

J-T TRANSPORT COMPANY, INC., ET AL.,
Appellees

On Appeal from the United States District Court for the Western District of Missouri—Western Division

BRIEF ON BEHALF OF J-T TRANSPORT COMPANY, INC.

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BRIEF ON BEHALF OF J-T TRANSPORT COMPANY, INC.

OPINIONS BELOW

The opinion of the District Court (R. 160) is reported in *J-T Transport Co.* v. *United States,* 185 F. Supp. 838 (1960). The recommended report and order of the Examiner of the Interstate Commerce Commis-

sion appears at page 15 of the record; the decision of Division 1 of the Commission and that of the entire Commission appear at 74 M.C.C. 324 (1958) and 79 M.C.C. 695 (1959), respectively (R. 22, 29). By a previous pro forma order, the Commission had entered a final order approving the order of Division 1, *supra.* (R. 28)

The reason for two opinions and orders of the Commission in the same proceeding appears of record. Upon the entry of the order of the Commission on July 25, 1958, (R. 28), J-T had exhausted its administrative remedies. Whereupon, on August 18, 1958, J-T filed Civil Action No. 12010 in the United States District Court for the Western District of Missouri, challenging validity of the orders of the Commission, dated January 31, 1958, (R. 22) and July 25, 1958, (R. 28), upon the grounds that same were unreasonable, arbitrary, capricious, unlawful, an abuse of discretion, in excess of statutory authority and short of statutory right for the various reasons assigned in the complaint. The cause was styled *J-T Transport Company, Inc., plaintiff,* vs. *United States of America and Interstate Commerce Commission, defendants.* (R. 8).

Subsequently, and before the filing of answer on behalf of either the United States of America or the Interstate Commerce Commission, Division 1 handed down a report in another proceeding which appeared, upon the face thereof, to be diametrically opposed, in material respects to the report of January 31, 1958. Whereupon, J-T tendered to the Interstate Commerce Commission another petition for reconsideration which the Commission accepted for filing, vacating its previous order of July 25, 1958, and reopening the proceeding for consideration on the present record. The Com-

mission, having reopened the proceeding for further administrative action, by agreement of the parties an order was entered in Cause No. 12010, permitting plaintiff to take a voluntary non-suit without prejudice. (R. 8, 9).

The foregoing charges were made in the complaint filed in the court below in this action, and it was further charged in the complaint below that the matter was held under advisement by the Commission until June 15, 1959, at which time the report and order (R. 29) was handed down. It was charged that it was obvious therefrom that the last report and order, on the same record, constituted nothing more nor less than an extended argument in support of an effort to bolster the report and order of January 31, 1958. (R. 9).

In their answer below, the defendants do not deny the allegations with respect to the previous action filed by J-T, but they do deny the implications contained in that portion of the complaint referred to above. (R. 55).

STATUTES INVOLVED

These appeals involve validity and legality of the action of the Interstate Commerce Commission in construing and applying the August 22, 1957 amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15) and 309(b), 71 Stat. 411, as well as the National Transportation Policy as enunciated by Congress (54 Stat. 899, 49 U.S.C. note preceding Sections 1, 301, 901 and 1001), in denying an application for a contract motor carrier permit.

QUESTIONS PRESENTED

1. Whether the Commission may, by administrative action, do by indirection that which Congress has expressly declined to permit it to do by direction, in denying an application for a contract motor carrier permit.

2. Whether the Commission has properly interpreted and applied the five tests enumerated in Section 209(b) of the Act.

3. Whether the Commission may refuse a contract motor carrier permit by the imposition of a sixth test not contained in the Act, in determining whether granting of the application would be consistent with the public interest.

4. Whether the Commission may legally deny an application for a contract carrier permit upon the basis of presumptions and conclusions, unsupported by findings of fact predicated upon substantial evidence.

5. Whether, in the light of the National Transportation Policy, the Commission may legally construe the Act as to be designed for the benefit of motor common carriers, and apply same in such manner as to militate against contract carriage and destroy the advantages inherent in the latter mode of transportation.

6. Whether the Commission, in denying an application for a contract carrier permit, may ignore the tests prescribed by Congress, and apply tests of its own creation.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment of a three-judge district court, setting aside an order of the Interstate Commerce Commission, entered on June 15, 1959, denying an application of J-T Transport Company, Inc., for a contract motor carrier permit.[1] The Interstate Commerce Commission and the United States of America were defendants in the court below (R. 1), but it is to be noted that no appeal was perfected by the United States.

On March 14, 1957, J-T Transport Company, Inc., hereinafter referred to as J-T, filed with the Commission an application for a permit to operate, as a contract carrier by motor vehicle, over irregular routes of uncrated landing gear bulkheads, requiring special handling and equipment because of their fragile nature, from Indianapolis, Indiana, to Wichita, Kansas. Such application was assigned Docket No. MC-11185, Sub. 102. (R. 15).

J-T for a number of years has been engaged, pursuant to authority of the Commission, in the transportation, as a contract carrier by motor vehicle, over irregular routes, of uncrated airplane parts and equipment requiring special handling and equipment, between a number of points in the west and midwest, and in so doing has conducted a substantial operation. (Page 3, Commission's main brief).

On April 9, 1957, (R. 65) upon application of J-T, and with the support of Boeing Airplane Company, the Commission, after full investigation and a finding that

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[1] The orders of the Commission involved herein also deal with another application designated as Docket No. MC-11185, Sub. 100, (R. 22 and 29). This case involves only Sub. 102.

there was an immediate and urgent need for the service proposed by plaintiff and that there was no carrier service capable of meeting such need, pursuant to authority vested in it by Section 210(a) of the Act, granted to J-T temporary authority to perform the transportation for which permanent authority was sought, and from such time J-T has been and is engaged in performance of the transportation covered by the application.

The application was heard by an examiner of the Commission on May 22, 1957, (R. 15), at which time affected railroads, a number of motor common carriers designated as "heavy haulers", and one motor common carrier, U.S.A.C. Transport, Inc., an appellant herein, intervened in opposition. U.S.A.C. Transport, Inc., hereinafter referred to as U.S.A.C., is the only carrier of any type which persisted in its opposition to the application, U.S.A.C. being a motor common carrier holding authority to operate, over irregular routes, in the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight or fragile character. Under such authority, U.S.A.C. could, within the scope of operations permitted by common carriers and as a common carrier, perform the transportation sought to be performed by J-T as a contract carrier, but U.S.A.C. has never participated in performing the involved transportation. (R. 15).

On July 18, 1957, the examiner filed his recommended report and order wherein he found that the proposed operation by J-T would be consistent with the public interest and the National Transportation Policy, and that a permit authorizing such operation should be granted. (R. 15)

Exceptions being filed, on January 31, 1958, Division 1 of the Commission handed down a report and order, published in 74 M.C.C. 324 (R. 22), the effect of which was to deny the application to perform the involved transportation as a contract carrier solely because one common carrier held authority to perform the transportation as a common carrier, and had expressed a willingness so to do. Petitions for reconsideration filed by J-T and various nitervenors were overruled by the Commission on July 25, 1958, (R. 28).[2]

Subsequently, the entire Commission reconsidered the matter on the existing record and, by a split decision, handed down a report and order on June 15, 1959, again denying the application (R. 29), such report being published in 79 M.C.C. 695. Therefrom, it will be observed, as did the court below, that the report and order of June 15, 1959, is that of only four of the eleven members of the Interstate Commerce Commission.

THE FACTS OF THE CASE

Division 1 of the Commission found that the statement of facts contained in the examiner's report to be accurate in all material respects (R. 24), and the entire Commission found the material facts not to be in dispute (R. 31).

The facts as reflected by the record are that at the time of the hearing, J-T was operating thirty-three tractors and forty-five trailers. The trailer which it

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[2] Aircraft Industries Association of America, Inc., and Contract Carrier Conference of American Trucking Associations, Inc., were permitted to intervene in support of the application (R. 28). Common Carrier Conference—Irregular Route, and Regular Common Carrier Conference of America Trucking Associations, Inc., intervened as defendants in the court below.

was using from Indianapolis to Wichita, under its temporary authority and which it will use in the proposed operation, was specially constructed. It is thirty-five feet long, twelve feet six inches high and eight feet wide. It has an underslung frame and an electric elevator is built in the trailer which operates with cables to raise and elevate the floor from the underslung part of the trailer up even to the rear wheels so that an airplane part can be rolled in or out. The roof also raises up and down with the elevator. Special floor racks move with the trailer for the loading and unloading of airplane parts. J-T maintains a terminal at Wichita. (R. 17).

Boeing Airplane Company supported the application. As pertinent herein, it operates a plant at Wichita for the production of airplanes. It has been using J-T's service to transport landing gear bulkheads from Indianapolis to Wichita to the extent of about four loads a month. This for four months under temporary authority. A load consists of four landing gear bulkheads, each weighing about 1380 pounds. The bulkheads are made of aluminum, titanium and magnesium and extreme care must be used for their transportation. Each one is worth about $24,000.00. J-T's equipment, as above-described, was made for and is dedicated to the exclusive use of this shipper for the operation involved in the application and such equipment is necessary to adequately handle the shipper's transportation requirements from Indianapolis to Wichita. J-T now serves the shipper and works closely with it on its transportation problems, and since it has a terminal at Wichita, its equipment can be furnished on short notice. The bulkheads must move in an expedited service as they must be at the plant when they have to

be installed at a certain specified time in a specified airplane. Prior to the use of J-T's service, rail service was used but the cost of constructing, transporting and returning special containers made this service prohibitive. (R. 18).

The examiner summarizes, as follows (R. 19):

> "Summarizing briefly, one shipper supports the application. As concerned herein, it now is using applicant's service under temporary authority from Indianapolis to Wichita. Applicant has constructed a special unit of equipment as hereinbefore described to handle the shippers' traffic as herein involved and such equipment is dedicated to the exclusive use of the supporting shipper. Applicant's terminal at Wichita is located near the shipper's plant and its special equipment can be obtained on one hour's notice. In the circumstances, the examiner is of the opinion that a need has been shown for the proposed operation and that a grant of such authority will not adversely affect present transportation facilities to any material extent."

With respect to U.S.A.C., the Examiner found (R. 19):

> "It has handled numerous shipments of airplane parts which because of size or weight have required special handling or equipment from and to points not involved herein. It claims that if its equipment is not suitable for the transportation requirements of the shipper herein, it will construct any type of equipment that is needed."

The traffic manager for Boeing testified that he had previously used the service of U.S.A.C., in 1953, and after giving one instance of unsatisfactory experience

was cut off from further testimony in that regard by the examiner (R. 101).

With respect to the relationship between J-T and Boeing and the latter's need for a contract carrier service, the witness said (R. 91):

> "Well, we feel they are just merely a part of our production line in that we can schedule the parts right from our manufacturer, and the shipments are moved right into our receiving area and through the inspection and right on into our production, so they are actually just an extension of our production line. . . . We feel we definitely need this type of service to furnish or build the best type of aircraft that we can for the United States Air Force."

The appellant U.S.A.C. is a motor common carrier operating over irregular routes, transporting aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, between points in the United States east of the Mississippi River, on the one hand, and on the other, points west of the Mississippi River. It has handled numerous shipments of airplane parts which because of size or weight have required special handling or equipment from and to points not involved herein, but none from and to points involved in this application. (R. 19).

The only evidence adduced on behalf of U.S.A.C. was the testimony of Mr. Martin A. Decker and exhibits filed by him, appearing in pages 110, et seq., of the record. The evidence on behalf of U.S.A.C. is more significant by virtue of what it omits than by what it supplies.

The witness says U.S.A.C. has a terminal at Indianapolis, but none at Wichita; equipment is stationed at Indianapolis, and equipment moves through Indianapolis; he says that a majority of the equipment moving through Indianapolis is deadheading (R. 116), but that is because of traffic handled from Tinker Field, Oklahoma, (R. 117), and this equipment consists of all types of units, not those which could be used in performance of the involved transportation (R. 120).

The witness says that if the traffic were tendered to U.S.A.C. it would modify equipment to meet the shipper's requirements (R. 112, 118), but nowhere does he say that U.S.A.C. would dedicate this equipment to the exclusive use of the shipper. All he says in that connection is:

> "Q. If the instant traffic were tendered to you, would you be willing to station a closed-top van trailer at Indianapolis?
>
> A. We would." (R. 118)

The witness admits that in U.S.A.C.'s tariff, Supplement No. 1 in F.I.C.C. No. 30, Rule 40 therein provides:

> "The determination of equipment to be used to transport any shipment efficiently and safely shall rest exclusively with the carrier."

It does not appear from the evidence adduced on behalf of U.S.A.C. that it would assign any motor vehicle for a continuing period of time to the exclusive use of the shipper here involved, or that it has ever assigned a motor vehicle to the exclusive use of any shipper; it does not appear that it will provide a transportation service designed to meet the distinct need of

the shipper supporting this application. It does not appear, contra to the statement in appellant's brief, that U.S.A.C. was operating with idle equipment; it does not appear that U.S.A.C. has participated in handling involved traffic, or that it has any prospect of so doing; *and, finally, there is not one iota of evidence that granting of the instant application will have any effect upon the services of U.S.A.C. Transports, Inc.*

LEGISLATIVE HISTORY OF PERTINENT SECTIONS OF THE ACT

One of the most impelling reasons why the orders of the Commission should be set aside and the judgment of the court below affirmed is found in the legislative history of pertinent sections of the Act. Our position on this point is that by its orders here attacked, the Commission has done indirectly that which it sought authority from the Congress to do directly, and was there rebuffed.

From the date of enactment of Part II of the Interstate Commerce Act, commonly known as the Motor Carrier Act, on August 9, 1935, (49 U.S.C. 301 et seq.), the Commission has so construed and applied the Act as to permit it to impose more and more regulations and restrictions upon contract carriage for the benefit of common carriage. It has not construed the Act as legislation designed to regulate all modes of motor transportation, but has treated it as being aimed at regulation of contract carriage. Examination of the Act itself, will, however, suffice to establish that thereby the Congress intended that all modes of motor carriage be regulated. This court, in *American Trucking Associations* v. *United States,* 344 U.S. 298, 312-313, in speaking of the conditions which caused enactment of the Act, said:

> "So Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition, while at the same time protecting existing routes through the 'grandfather' clause."

As early as 1937, however, the Commission, in a divided opinion, adopted the position that the purpose of the Act was to protect common carriage at the expense of contract carriage. In ex parte No. MC-12, *Contracts of Contract Carriers,* 1 M.C.C. 628, 629, it was said:

> "This principle is inherent in the motor carrier Act, 1935. The underlying purpose is plainly to promote and protect adequate and efficient common-carrier service by motor vehicle in the public interest, and the regulation of contract carriers is designed and confined with that end in view. For that reason, it differs from the common-carrier regulation."

Historically, since enactment of the Act, as will be demonstrated hereinafter and is demonstrated in the brief filed on behalf of appellee Contract Carrier Conference of American Trucking Associations, Inc., the Commission, by appeals to Congress and by the promulgation of rules and regulations and the handing down of administrative edicts has consistently sought to limit and restrict the operations of contract motor carriers to the benefit of motor common carriers. It has long been the opinion of the contract carrier industry, as well as of responsible representatives of the government, that the Commission had overreached itself and was exercising authority finding no basis in law with respect to many of its restrictive reports dealing with the contract carrier industry. The statement by the

Commission appellant in brief that the Commission has consistently applied the so-called "willingness and ability test" in passing on contract carrier applications is contra to the published reports of the Commission, from which it will be shown that numerous tests have been tried and abandoned in the effort to regulate contract carriage.

On of these theories was the theory that the Commission could lawfully restrict the number of contracts which a contract carrier might hold, which theory was stricken down by this Court in *United States* v. *Contract Steel Carriers,* 350 U.S. 409. There, as here, the Commission sought to justify its position upon the basis of exercise of its discretion in determining what would be consistent with the public interest. There, however, the Commission's position was stronger than we here find it, in that there it had not made specific application to Congress for such power and been rebuffed.

As enacted, and as continued until the amendments of 1957, the term "contract carrier by motor vehicle" was defined by Section 203(a)(15) as follows:

> "The term 'contract carrier by motor vehicle' means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph 14 of this section and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation."

Section 209(b), as originally enacted, provided that permits for contract carrier applications, the applicant meeting other prescribed conditions, should be issued if it appeared that the proposed operation "will be

consistent with the public interest"; upon enactment of the National Transportation Policy in 1940, Title 49 U.S.C., (Note preceding 301), the foregoing was changed to read: "will be consistent with the public interest and the National Transportation Policy declared in the Interstate Commerce Act".

It is to be noted that to qualify for a permit as a contract carrier, insofar as the sections here pertinent are concerned, it was required *only* that the carrier operate under individual contracts or agreements, that such transportation be consistent with the public interest, and that contract carriage was specifically recognized to be entitled to the benefits of the National Transportation Policy.

As distinguished from the limited requirement that the operation be consistent with the public interest insofar as contract carriage is concerned, insofar as common carriage was concerned the Congress provided that a certificate to operate as a common carrier could not be issued unless it was established that the public or future convenience and necessity required such operation. (49 U.S.C. 307).

This Court has said that the legislative history of an Act is of importance in determining the scope of authority of an administrative agency. In this connection see *Harrison* v. *Northern Trust Co.*, 317 U.S. 476; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54; *U. S.* v. *C. I. T. Credit Corp.*, 344 U.S. 218; *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697. And it has said, as well, insofar as the Commission is concerned, that it will not sanction improvisation and permit the Commission to do indirectly that which Congress has not seen fit to allow it to accomplish directly. See *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 475.

In its order of June 15, 1959 (R. 29), as well as in brief, the Commission takes the position that it has authority to deny a contract carrier permit solely because a common carrier avers its willingness and ability to perform the specialized transportation for which a need has been demonstrated. It is the position of the Commission in brief, as we understand it, that it possessed and exercised such authority both before and subsequent to the amendments of 1957. We present, however, that it would be most unreasonable to assume that an administrative body of the stature of the Commission would apply to Congress for specific authority to deny contract carrier permits upon such ground if the Commission was of the bona fide opinion that it possessed general authority so to do under the Act. That, however, is precisely what the Commission has done in the case at bar.

It is obvious that as early as 1955 the Commission, itself, doubted its authority in this respect, and opinion within the Commission had formalized itself to the extent that in its 69th Annual Report to the Congress (1955) under "Legislative Recommendations", at page 131 of the Report it is said:

> "19. We recommend that Section 203. (b) (49 U.S.C.A. 309 (b)) be amended so as (1) to empower the Commission to limit the person or persons and the number or class of persons for which a contract carrier by motor vehicle may lawfully perform transportation services, and (2) *to provide that motor contract carrier permits may be issued only upon a showing that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.*" (Emphasis supplied.)

In discussing the second recommendation, *supra*, the Commission said:

> "The further recommendation to permit the issuance of motor contract carrier authorities *only* upon a showing that existing common carriers are unwilling or unable to provide the required type of service, *would give the Commission a further measure of control over the expansion of contract carriage and*, at the same time, would serve to protect shippers whose peculiar needs cannot adequately be met by common carrier. It would have the added advantage of allowing denial of a contract carrier application where no service other than dedication of equipment is needed by the shipper or proposed by the applicant, if, in the circumstances, a common carrier could and would dedicate equipment (Emphasis supplied)."

The foregoing, in our opinion, is formal admission on the part of the Commission in 1955 that it had no authority in law to deny an application for a contract carrier permit solely because a common carrier expressed a willingness and ability to perform the involved transportation. The position assumed by the Commission in the case at bar is directly contra to its legislative recommendation of 1955.

The Congress did not see fit to follow the legislative recommendation of the Commission in 1955 and no bill to invest the Commission with the requested authority was introduced.

In 1956, the Supreme Court handed down its opinion in *United States* v. *Contract Steel Carriers*, 350 U.S. 409, and therefrom it was apparent that the Commission should be authorized to limit the number of contracts which a contract carrier might hold in order to preserve the distinction between the two modes of

transportation, i.e., common and contract carriage, as required by the National Transportation Policy as enunciated by Congress. See Historical Note preceding 49 U.S.C.A., Section 301, wherein the Congress, in 1940, said:

> "National Transportation Policy: It is hereby declared to be the National Transportation Policy of the Congress to provide for fair and impartial regulation of *all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each*; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers. . . . All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (Emphasis supplied.)

After the decision in the *Contract Steel Carriers* case, *supra,* the Commission was reasonably sure that the Congress would be receptive to an amendment to the Act restricting the number of contracts which a contract carrier might hold, and it took advantage of the opportunity to try to "go through the back door," so to speak, and tack on an amendment which would have given it authority to do that which it has done by administrative edict in this case.

In its 70th Annual Report (1956) to the Congress under "Legislative Recommendation" at page 162, the Commission said:

> "6 (a) We recommend (1) that the definition of contract carrier by motor vehicle as set forth in section 203 (a) (15) (49 U.S.C.A. 303 (a) (15)), be amended so as to state clearly the nature of the service which may be performed by such carriers

and to provide that such services may be performed under continuing contracts for only one person or a limited number of persons, and (2) if so amended, that section 212 be amended by adding a new paragraph (c) authorizing the Commission to revoke the permit of such a carrier and to issue in lieu thereof a certificate of public convenience and necessity if it finds, after a hearing, that the operations of the permit holder are not those of a contract carrier under the revised definition, are those of a common carrier, and are otherwise lawful.

(b) We also recommend that section 209 (b) be amended so as (1) to empower the Commission to limit the person or persons and the number or class of persons for which a contract carrier by motor vehicle may lawfully perform transportation services without additional authority and (2) *to provide that additional permits may be issued only upon a showing that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.*" (Emphasis added).

In connection with the second recommendation under (b), *supra*, the Commission said:

"The further recommendation to permit the issuance of motor contract carrier authorities *only upon a showing that existing common carriers are unwilling or unable to provide the required type of service would provide a further measure of control* over the unlimited expansion of contracts for non-specialized service. It would also serve to protect the shippers whose peculiar needs cannot adequately be met by a common carrier."

It is interesting to note that the dedication of equipment feature, contained in the Sixth Report, is omitted

in the 70th Report, but it is also interesting to note that the Commission in 1956 still was of the opinion that it needed legislative authority to permit it to issue contract carrier permits only upon a showing that existing common carriers are unwilling or unable to provide the required service.

The legislation to which we now allude resulted from the foregoing recommendation in the Commission's 70th Annual Report.

In the 1st Session of the 85th Congress the Commission procured the introduction of identical bills in the House and Senate, being H. R. 5123 and S. 1384. The Senate Bill, as amended, subsequently was enacted. The House Bill was superseded by H. R. 8825, which was identical with S. 1384, as amended. We shall, therefore, refer only to S. 1384, inasmuch as the public hearings were conducted in connection therewith before a Subcommittee of the Committee on Interstate and Foreign Commerce of the United States Senate. The distinction between S. 1384, *as introduced and sponsored by the Commission*, and S. 1384 *as enacted into law by the Congress* is of paramount significance.

For convenience we here reproduce pertinent portions S. 1384 as introduced under the sponsorship of the Commission, with emphasis added.

(S. 1384, 85th Cong., 1st Sess.)

A Bill To revise the definition of contract carrier by motor vehicle as set forth in section 203(a)(15) of the Interstate Commerce Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Con-

gress assembled, That part II of the Interstate Commerce Act, as amended, is amended as follows:

(1) By changing paragraph (15) of section 203 (a) thereof (49 U. S. C., Section 303 (a) (15)), to read as follows:

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons for the furnishing of transportation services *of a special and individual nature required by the customer and not provided by common carriers.*";

"Sec. 2. Part II of such Act is further amended by inserting between the words 'thereunder,' and 'that' in the second sentence of section 209 (b) (49 U.S.C. 309 (b)), the following: 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown,' and (2) by changing the third sentence thereof to read as follows: 'The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions, and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirement established by the Commission under section 204(a)(2) and (6): Pro-

vided, That within the scope of the permit and any terms, conditions, or limitations, attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require." (Emphasis added.)

It is to be noted that the Commission sought authority to apply both the "specialization" and "willingness and ability" of common carrier tests.

And now, for convenience, we reproduce pertinent portions of S. 1384 as enacted, and which became effective on August 22, 1957. Therefrom it will be noted that the features of the bill as introduced, upon which we placed emphasis, have been omitted and, we respectfully present, the Commission was forced to agree to delete same and concede that it could not obtain legislative sanction for the authority which it here exercises by administrative edict by the very certain threat of being unable to obtain passage of any legislation with these features remaining therein.

Public Law 85-163.
85th Congress, S. 1384.
August 22, 1957.

AN ACT.

71 Stat. 411.

To revise the definition of contract carrier by motor vehicle as set forth in section 203(a)(15) of the Interstate Commerce Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That part II of the Interstate Commerce Act, as amended, is amended as follows:

"(1) By changing paragraph (15) of section 203 (a) thereof (49 U.S.C. 303(a)(15)), to read as follows:

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) *for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.*" (Emphasis added.)

"Sec. 2. Part II of such Act is further amended (1) by inserting after the second sentence of section 209(b) (49 U.S.C. 309(b)) a new sentence to read as follows: 'In determining whether issuance of a permit *will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements;*" (Emphasis added.)

The brief and argument of the Commission would lead the Court to believe that the Commission of its own volition deleted the objectionable features of S. 1384 as introduced. Such position does violence to the record.

Hearings on S. 1384 were conducted before a Subcommittee of the Committee on Interstate and Foreign Commerce of the United States Senate, 1st Session,

85th Congress, on April 17, May 7, 8 and 9, 1957, Senator George A. Smathers being chairman of the Subcommittee. The printed transcript is entitled "Surface Transportation—Scope of Authority of I.C.C.". Hereinafter we will refer thereto as Hearings, with appropriate page reference. In the course of the hearings tremendous opposition developed to S. 1384, primarily by virtue of the portions thereof which were eventually deleted, and the bill, as enacted, was the result of a compromise between representatives of the contract carrier industry and the common carrier industry, with the understanding that the contract carrier industry had no opposition to the proposed legislation so long as the existence of common carrier service might not be used by the Commission as the basis for denial of a contract carrier permit, other prerequisites being met.

In limine, at pages 10 and 11 of Hearings, appears a letter from Mr. William P. Rogers, then Deputy Attorney General, writing on behalf of the Department of Justice to Honorable Warren G. Magnuson, Chairman, Committee on Interstate and Foreign Commerce, with reference to S. 1384 as introduced in which, insofar as here pertinent, the Department of Justice opposed the bill in part and said:

> "The bill would amend section 203(a)(15) of the Act by changing the definition of 'contract carrier' to mean any person who engages in transportation by motor vehicle of passengers or property in interstate commerce for compensation (with the exception of common carriers by motor vehicle and those engaged in motor vehicle transportation for hire as an express company) 'under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a *special and individual nature*

required by the customer and not provided by common carriers." (Emphasis added.)

"We are opposed to enactment of that part of the definition, which reads '*and not provided by common carriers.*' This quoted limitation is rather vague and it could lead to the contention by common carriers that they provide contract carrier services. Such an interpretation might unduly limit the number and availability of contract carriers. Many contract carriers are small business men who would not be able to compete on a common carrier basis.

"The bill would also amend section 209(b) of the Act, which sets forth the procedure and criteria to be observed in granting contract carrier permits, by adding a new criterion to the effect that the Commission must find '*that existing common carriers' are unwilling or unable to provide the type of service for which a need has been shown.*" Emphasis added.)

"The Department considers this proposed amendment unduly restrictive of the ability of applicants (particularly small business men) to enter the contract carriage field, and is therefore opposed to its enactment.

"The Bureau of the Budget has advised that there is no objection to the submission of this report."

The testimony of Honorable Owen Clarke, Chairman, Interstate Commerce Commission, in support of S. 1384, appears at pages 21 et seq. of Hearings, and we are reasonably sure that when Chairman Clarke testified he knew the attitude of the Department of Justice as reflected by the letter, *supra*, and he knew, as well, that the Department of Commerce was unalterably opposed to both of the objectionable features of the bill. And, of course, he was well aware of the very

considerable opposition from shippers needing and using contract motor carrier service and the contract motor carrier industry at large.

With these facts at hand Chairman Clarke magnanimously (sic) agreed (Hearings page 22) to remove from the proposed amendment to section 209(b) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," but, and here the joker, he said nothing about striking the proposed amendment to section 203(a) "*and not provided by common carriers.*", nor the "special" feature of the proposed amendment to section 203(a)(15).

Throughout the testimony of Chairman Clarke he sought enactment of the legislation with the above features remaining therein, the practical effect of which would have been to give the Commission authority to do that which it has here done without authority, and say that a carrier could not perform a service as a contract carrier if a common carrier offered to provide such a service.

The Congress refused to grant the Commission the authority it sought, deleted "and not provided by common carriers," substituted "transportation services designed to meet the distinct need of each individual customer" for the proposed "special and individual nature," and thereby definitely established that the existence of common carrier service was not to preclude issuance of contract carrier permits, other prerequisites being met. That, however, is exactly what the Commission has here done.

We shall now endeavor to demonstrate from the legislative history of S. 1384 that removal of these objec-

tionable features was not due to magnanimity on the part of the Commission, and that S. 1384 became law only by virtue of the fact that the Congress did not propose to authorize the Commission to deny an application for a contract carrier permit upon the basis of a common carrier averring its willingness and ability to perform the needed transportation, all other prerequisites being met.

We will not burden the Court with extensive quotations from the evidence adduced at the Hearings, but do say, without fear of successful contradiction, that S. 1384 with "and not provided by common carriers" remaining therein received the enthusiastic support of the Commission, of common carriers and the various Associations representing them. The Senators, however, were dubious of this "joker," and the Department of Commerce, joining forces with the Department of Justice, as well as shippers, contract motor carriers, and Associations representing contract motor carriers, vigorously opposed same upon the ground that the Commission would interpret it as authority to deny a contract carrier permit upon the ground that a common carrier averred a willingness to perform the same service.

Hon. Louis S. Rothschild, Undersecretary for Transportation, Department of Commerce, testified before the Subcommittee on May 8, 1957; his testimony appears at pages 197 et seq., of the Hearings. The Senators, in the course of his testimony, evinced an early interest as to his views with respect to the "joker". Before Mr. Rothschild could get to the point Senator Schoeppel, at page 200, said:

> "I would like to ask a question right there: Supposing you had a common carrier serving certain

territory but wasn't furnishing adequate service. There was common carrier service there, but of a very limited nature, and with the mode and extent of doing business nowadays would you draw the line there that the common carrier had to furnish reasonable adequate and prompt service?"

To the foregoing question Mr. Rothschild, at page 201, responded:

"Well, later in my statement, Senator Schoeppel, we say that we don't quite believe that the rule should be as stringent as proposed by the ICC and that it should not be necessary to make all of these showings in order for a person to get a contract carrier."

On the same page, speaking with reference to the contract carrier industry, Mr. Rothschild said:

"Contract carriers by motor vehicle developed prior to enactment of the Motor Carrier Act in response to the needs of certain shippers who could not or preferred not to provide their own transportation, yet required a more specialized and individual service than was available from common carrier.

"A contract carrier would enter into a special agreement with a single shipper, usually on a long-term or individual basis, under which the carrier would provide a service which was closely integrated to the particular needs of the shipper. It was the kind of service which the shipper himself might have provided had he so elected, and it constituted in essence a virtual dedication of the carrier to the needs of a single shipper, or in some cases, a group of closely related shippers.

"The Congress, in enacting legislation to regulate the motor transportation industry, recognized this

development and provided for a different degree of regulation applicable to contract carriers than it provided for common carriers."

Senator Smathers, Chairman of the Subcommittee, and Mr. Rothschild, clearly express the Congressional intent in deleting "and not provided by common carriers", at pages 202 and 203 of the Hearings, as follows:

Mr. Rothschild, among other things not here pertinent, made this statement at page 202:

"Commissioner Clarke, in testifying on S. 1384 yesterday withdrew the Commission's request for authority to deny application for contract authority unless it is shown that existing common carriers are unwilling or unable to provide the required type of service."

He was interrupted by an immaterial question, and then Mr. Rothschild continued in response to a question from Senator Smathers, as follows:

"We would not object to that change. However, the Department does not believe that the existence or non-existence of adequate common carrier service should be included in the definition of a contract carrier by motor vehicle as one of the distinguishing characteristics of a contract carrier. Perhaps I should explain that a little more, Mr. Chairman." (Emphasis added.)

"Senator Smathers: We would appreciate it.

"Mr. Rothschild: As we read the proposal of the Interstate Commerce Commission, and then the amended position which they took in Commissioner Clarke's statement yesterday, *we believe that what they are currently proposing is that in the definition of a contract carrier by motor vehicle, the existence or non-existence of common carrier motor*

service should be included, but when it comes to their own procedures as to how they operate under this, they retain for themselves the right to cast that qualification out. We think, in order to be consistent, it ought to be out both places. (Emphasis supplied.)

"Senator Smathers: In other words, as the Senator from Kansas brought out, whether or not there is the availability of a common service should not be a point in consideration?

"Mr. Rothschild: They should not be able to deny the application of a common (sic) (contract) carrier simply because someone claims that there is common carrier service there.

"Senator Smathers: Thank you.

"Mr. Rothschild: Does that answer your question, Senator Schoeppel?

"Senator Schoeppel: Yes."

The Department of Commerce had introduced a bill of its own designed to redefine "contract carrier", and in connection therewith a comparison was being made by the Senators with the ICC sponsored bill. At page 204 of the Hearings, and during the course of Mr. Rothschild's testimony, Senator Smathers said:

"So then you people made a proposal and the ICC has made a proposal. Now let's look at the ICC proposal for just a minute to see how they propose to redefine what we mean by contract carriers. I am going to read. (Senator Smathers then reads the proposed definition of contract carrier contained in the proposed amendment to S. 1384, including 'and not provided by common carrier'. And then the Senator goes on): Now as I gather it, your particular recommendation is that

there be no limit as to the number of persons with whom they do business?"

And then the following colloquy took place:

"Mr. Rothschild: No sir; We think the Commission should have the right to take into consideration the number of contracts that a contract carrier would have, *but we do not believe that this definition which is contained in line 4, 5 and 6 should apply at that point any more than the Commission says it should not apply in Section 2 of the same proposal.*

"Senator Smathers: In other words, then, you would be satisfied with the language on line 3, page 2, 'under continuing contracts with one person or a limited number of persons'?

"Mr. Rothschild: For the furnishing of transportation services.

"Senator Smathers: For the furnishing of transportation services of a special, etc. But; I want to get just this language here that you are satisfied with.

"Mr. Rothschild: We would stop that definition with the word 'customer' in line 6."

Line 6 in the format of the Bill was simply "customer not provided by common carriers", and as Mr. Rothschild told Senator Smathers, the Department of Commerce would put a period after "customers" and delete "not provided by common carriers".

And then further, in discussion the proposal of Chairman Clarke to omit "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" and leaving in "and not provided by common carriers", the fol-

lowing discussion took place between Senator Smathers and Mr. Rothschild at pages 206 and 207 of the Hearing:

"Senator Smathers: . . . Now, we come on down to the next line: 'for the furnishing of transportation services of a special and individual nature required by the customer'. You want to start (stop) right there and 'not provided by common carrier'?

"Mr. Rothschild: We still prefer our own definition, but this would be the same.

"Senator Smathers: Except you leave out 'and not provided by common carriage'.

"Mr. Rothschild: Yes.

"Senator Smathers: We, as a committee, don't like to be caught between two departments of the government, so to speak, the ICC with one bill, and the Department of Commerce with another bill, each one fighting for its own language because we have to resolve it a little bit. This language to be satisfactory to you I gather if we left off that last phrase on line 6 'and not provided by common carrier' is that correct?

"Mr. Rothschild: Yes, sir.

"Senator Smathers: Did I get an answer to that?

"Mr. Rothschild: The answer is yes.

"Senator Smathers: I understand yesterday Chairman Clarke withdrew the Commission's support for this last phrase; Is that correct?

"Mr. Rothschild: In section 2, not in section 1.

"Senator Smathers: Not in section 1, but in section 2. You will find it on page 10 of his statement. What did he have reference to in this bill where he said he wanted to withdraw it?

"Mr. Rothschild: May I read a paragraph from his statement of yesterday?

"Senator Smathers: Yes, so we can clear on it.

"Mr. Rothschild: Commissioner Clarke said that: as drafted, S. 1348 would further provide that additional permits may be issued only upon a showing that existing common carriers are unwilling or unable to render the required type of service. I wish to state at this point that because of the very difficult burden of proof that would be imposed on applicants by the last-mentioned provision, the Commission upon further consideration voted to withdraw its recommendation to amend section 209. We therefore recommend that lines 9 through 15 on page 3 be amended to read:'

"(Mr. Rothschild continues): So that would eliminate the words that existing common carriers are unwilling or unable to provide the service for which a need has been shown.

"Senator Smathers: He would eliminate that on lines 12, 13, and 14; Is that correct?

"Mr. Rothschild: That is correct.

"Senator Smathers: Is it your understanding, Mr. Barton—how does he feel about it on line 6, do you know?

"Mr. Barton: (Commission counsel): I understand he wanted to withdraw that requirement altogether.

"Mr. Rothschild: Our interpretation may not be correct, but we think he wanted it in the definition but not in section 2. *We think it should come out in both places.*" (Emphasis supplied.)

As a definite indication that the Senators were interpreting the proposal to strike "and not provided by common carriers" as assurance that the Commission

would not have authority to deny a contract carrier permit because common carrier service was alleged to be available, we refer the Court to Hearings, page 214, where the testimony of Mr. H. O. Mathews, General Manager of the Transportation and Distribution Division of Armour & Company appears:

> "Mr. Mathews: As I understand it, Senator, it would permit the common carriers to complain that they are in a position to render that same service, and therefore the Commission would take the contract carrier out of business, or quit.
>
> "Senator Smathers: Well, we have all agreed—you just heard the Department of Commerce here, and you heard probably the Secretary of the ICC yesterday—
>
> "Mr. Mathews: I didn't hear him.
>
> "Senator Smathers: Apparently, they are in agreement that they should strike out the words 'and not provided by common carriers' (Emphasis supplied).
>
> "Mr. Mathews: This, of course, was prepared around that, and I didn't understand what the Secretary was saying.
>
> "Senator Smathers: If we leave out the words 'not provided by common carriage', *even though there may be common carriage in the area, it does not prohibit you from still doing business with a contract carrier.*
>
> "Mr. Mathews: With the suggestion of changes in the wording you were making a while ago, Senator, that might change that, although I haven't had an opportunity to review it. I didn't have the bill in front of me, and this statement was based on the bill as it was worded, and I will not burden you with reading further on that because that

might be ambiguous to the situation as it exists should the bill be changed.

"Senator Smathers: All right.

"Senator Schoeppel: Mr. Chairman, that just points out we have a perplexing problem here to incorporate language in the bill. Our friends from the ICC submitted a bill the way they wanted it. Now there have been some changes suggested. Now you come up with these points, and we have to wrestle with it. Now, some of these explanations here, by way of illustration, furnish us with an opportunity for discussing this matter in executive session and otherwise, to keep this thing on some kind of a, let us say, progressive yet equitably fair legislative basis."

With respect to the proposal of the Commission to delete "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" in section 2 of proposed S. 1384 and leaving "and not provided by common carriers" in section 1 thereof, Mr. Mathews, at page 219 of the Hearings said:

"Based upon Chairman Clarke's prepared statement my opposition to S. 1384 is *intensified rather than eliminated. As I read his testimony, no change is suggested in section 1 of the proposed bill.* The entire change to be in section 2. While the test to be applied to a new contract carrier is possibly modified to some extent by the amendment, it would still be extremely difficult to obtain new contract carriage within the definition of section 1 of the Act." (Emphasis supplied)

To the same effect see the testimony of Hon. Clarence D. Todd, General Counsel for the Contract Carrier Conference of American Trucking Associations, Inc.,

and the colloquy between Mr. Todd, Senators Schoeppel and Lausche, (Hearings 294-5) in which it was developed that leaving "and not provided by common carriers" in the proposed bill would enable the Commission to withhold permits for contract carriers to the same extent as would have been the case had "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" been permitted to remain therein. And, in this same connection, see the colloquy between Senator Lausche and Mr. Howard E. LeFevre, (Hearings 317) a contract carrier serving Ford Motor Company, in which it was developed that to omit "and not provided by a common carrier" would prevent the Commission from denying an application for a contract carrier permit on the ground that a common carrier was willing to provide the service.

In the testimony of Mr. E. G. Rice, President, Complete Auto Transit, Inc., a contract carrier serving General Motors, reference again is made to the proposal of the Commission to strike one portion of the objectionable feature of S. 1384 and leave in "and not provided by common carriers". At page 328 of Hearings, the following appears:

> "Senator Lausche: You are not giving testimony on S. 1769?
>
> "Mr. Rice: No. There is a provision in there that the service will not be provided by common carrier, and that Mr. Clarke did nothing about. However, further on there is the matter of the issuance of a permit and a common carrier being fit, willing, and able. That he agreed to take out. However, I make the point if it is in the first place you never will get to the second. You can't become a carrier under the definition, so it should

come out in both places, and I think Mr. Todd so testified.

"Senator Lausche: I think he testified that S. 1384 would further provide that additional permits may be issued only upon showing that existing common carriers are unwilling or unable to render the required type of service. Now, your opposition to this proposal is that while he agrees to rectify the language in Section 1, part II, he doesn't do so in the definition?

"Mr. Rice: That is right, and you will never reach Part II because you wouldn't be a carrier under the definition.

"Senator Lausche: I see, all right. Thank you very much.

"Mr. Rice: So it should be out in both places. Thank you." (Emphasis added).

We have made the statement heretofore that S. 1384, as enacted, was compromise legislation worked out between the Commission and the representatives of the contract and common carrier industries, with the understanding and agreement that the Commission might be granted authority to *limit contract carriers as to the number of contracts which they might hold and the services which they might perform, but that the Commission would not have authority to deny an application for a contract carrier permit on the ground that a common carrier was willing to perform the proposed transportation service for which a need has been shown.* In support of our statement we respectfully refer the Court to the testimony of Mr. Thomas F. Robertson, Executive Director, Common Carrier Conference—Irregular Route—American Trucking Associations, Inc. Hearings, pp. 345 *et seq.* Mr. Robertson prefaces

his testimony by the statement that the carriers he represents are those which are most competitive with the contract carriers, and then he says:

> "We have studied these bills and we have discussed them with our colleagues up in ATA and in deference to our contract-carrier colleagues the membership of our conference would be most happy to yield on sev ral points in the bill. *We would yield to the removal of the word 'specialized' in the definition which I think is in Part I, where they talk about special and individual nature, and we would also yield to the deletion of the words 'and not provided by common carriers,' in addition to what the Commission has already yielded in Part II of the Act, where the Commission lately made up its mind that it would remove that 'unwilling and unable' that burden of proof that a contract carrier would have.* (Emphasis supplied.)
>
> "We would yield these things to gain the main objectives, sir, and the main objective, to our point of view, is that the Commission have the unequivocal power to limit the number of contracts, and that they also would have a reasonable grandfather clause that would protect the property rights of those contract carriers who would no longer be within the new definition. We think that only fair."

After hearing the testimony of Mr. Robertson on the compromise legislation which had been worked out the Senators took special precautions to see that the Interstate Commerce Commission was represented and had no objection to the compromise, as appears at page 348 of the Hearings, as follows:

> "Senator Lausche: Is there a representative of the Interstate Commerce Commission here today?
>
> "Mr. Hardin: Yes, sir.

"Senator Lausche: You a · hearing what is being said?

"Mr. Hardin: Yes, sir.

"Senator Lausche: All right."

As we view the legislative history of the amendments, and the amendments themselves, it appears that in S. 1384, as enacted, Congress specifically provided that in determining whether issuance of a permit would be consistent with the public interest and the National Transportation Policy, the Commission should apply five tests, therein enumerated, and specifically refused to grant to the Commission authority to apply the tests of whether the proposed service was provided by common carriers, or that common carriers are unwilling or unable to provide such service. The Commission in the opinion of the court below, denied the instant application by the application of such sixth test. Such is also our opinion, based on the report of the Commission (R. 29). This view is supported by at least one of the Commissioners in that Commissioner Webb (R. 50) said:

> "Weighing the five tests prescribed by Section 209(b) of the Act for determining whether a permit should be issued, I agree with the result reached by the majority. *It seems to me, however, that the report prescribes a sixth test not authorized by Congress and, in fact, a test considered by the Congress and deliberately rejected.* The report seems to me to convey the impression that if an applicant for contract carrier authority flunks this sixth test, the application must be denied regardless of the extent to which the five enumerated tests of Section 209 (b) have been satisfied (Emphasis added).

"What I call the sixth test prescribed by the report is the conclusion that in each contract carrier application the burden is on the applicant to show that protesting common carriers are unwilling or unable to meet the shippers' reasonable transportation requirements. *The conclusion, in my opinion, is not supported by the language of public 85-163 or by the pertinent legislative history* (Emphasis added).

"When the bill S. 1384 which became public law 85.163 was introduced, it amended Section 203(a)(15) of the Act so as to define a contract carrier as one who conducts its business other than as a common carrier and '. . . under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.*'

"The Senate Committee on Interstate and Foreign Commerce deleted the language emphasized above. In addition, the Committee eliminated from the bill the requirement of a showing under Section 209(b) 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.' In place of the language last quoted, the Committee directed the Commission to consider 'the effect which granting the permit would have upon the services of the protesting carriers.' As thus amended, the bill was enacted into law.

"Obviously there is virtually no difference between the test formulated in the report of the Commission and the test which would have been prescribed by the language deleted from the bill. I do not see how it is possible to contend that the stricken language added nothing to the bill. Nor do I agree that the Senate Committee deleted that language solely because it required an impossible

burden of proof. If the Congress had intended to sanction the test employed in the report, it would no doubt have required in Section 203(a)(15) that the proposed service must be shown to be 'not provided by *protestant* common carriers' and in Section 209(b) 'that *protestant* common carriers are unwilling or unable to provide the type of service for which a need has been shown.'

"Contract carriers opposed the bill as originally introduced on the ground that the required proof as to the non-existence of adequate common carrier service would prevent extension of, if not destroy, contract carrier service. The Department of Commerce agreed. The Congress agreed. The need to employ a public and convenience necessity standard in Section 209 proceedings disappear when, under the new law, permits cease to be unrestricted licenses for hunting traffic. *As I see it the report attempts to write into Section 203(a)(15) and 209(b) language deliberately stricken by the Congress. The report converts compromise legislation, generally satisfactory to all concerned, into an unearned legislative victory for common carriers and a humiliating defeat for contract carriers.*" (Emphasis in last paragraph supplied.)

Senate report No. 703 of the First Session, 85th Congress, was submitted by Senator Smathers of the Committee on interstate and foreign commerce to accompany S. 1384. In the introduction he states the purpose of the bill, and there is no indication in the statement of purpose of any intent to grant the Commission additional authority to impose the sixth test referred to by Commissioner Webb.

Senator Smathers and the Committee emphasized recognition of the distinction between the two modes of transportation, i.e., contract and common motor car-

riage when, in speaking with reference to the proposed redefinition of contract carriage, the Report on page 2 says:

> "Congress recognized in the definition a difference between common and contract carriers, but, as Commission Chairman Clarke pointed out, the language of the present law is inadequate for proper administration and for observing the distinctions which Congress intended. Under the bill as introduced a contract carrier would be one who conducts its business other than as a common carrier and . . . under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and *not provided by common carriers.*" (Emphasis supplied.)
>
> "Chief among the differences thus proposed are that a contract carrier could have only one contract or a limited number of contracts. Important also *is that the service would be such as is not provided by common carriers.* These changes would constitute a significant tightening of the present law." (Emphasis supplied.)

And, then, in further reporting on S. 1384 as introduced, the Report at page 3 says:

> "A further change would be effected whereby that portion of Section 209(b) (49 U.S.C. 309(b)) relating to the issuance of a contract carrier permit would include a provision that a permit would be issued when it appears, *inter alia,* 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.' Presumably this was intended by the drafters to supplement the language in the definition providing that a contract carrier service is such as is 'not provided by common carriers.' "

And, then, as here pertinent, the Report of the Committee on page 3 continues as follows:

> "Undoubtedly the bill as introduced would supply a more positive statutory guide to the Commission than that existing today, and would make readily possible clearer distinctions than now exist as between motor common and contract carriers. *The Committee is of the opinion, however, that, as originally introduced, S. 1384 would be unduly restrictive on contract carriage. Accordingly, the Committee recommends a number of amendments to the bill.*" (Emphasis supplied.)

The Committee then, after observing that S. 1384 as introduced was the first specific attempt by the Commission to procure enactment of legislation on the subject-matter thereof, reported this on page 4:

> "However, the Commission, upon reflection, on the objections of contract and private carriers to the bill, concluded that in some respects S. 1384 would provide too rigid a pattern. It decided that the proposed requirement in Section 209(b) that additional permits could be issued only upon a showing that existing common carriers are unwilling or unable to render the required type of service should be withdrawn. And it asked for opportunity to make additional comments should the testimony of other parties propose further amendments. As will appear later, further amendments were proposed, and the Commission has given the Committee its views respecting them."

The Committee, in its report, then details the support of S. 1384 by witnesses representing the common carriers, their associations, and the railroads, as well as the opposition to S. 1384 from substantial shippers, contract carriers and associations representing con-

tract carriers. The Committee then said at page 5 of its Report:

> "The Department of Commerce, speaking through the Under Secretary for transportation, noted critically that some contract carriers today furnish a common carrier service and argued that a limitation on the number of contracts that may be held is desirable, as proposed in the bill. *It does not believe that the existence or non-existence of adequate common carrier service should be included in the definition of contract carrier.*" (Emphasis supplied.)

In further discussing the amendments recommended by the Committee which would strike from Section 1 of S. 1384 as introduced the language "and not provided by common carriers," and which would strike from Section 2 thereof the language "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," the Committee said at pages 5 and 6 of its Report:

> "Insofar as language is concerned, there can be no doubt that some of the parties at first entertained rather sharply divergent views as to the wording Congress might wisely and fairly adopt to express its own considered judgment. That all parties or groups affected by the bill are earnestly concerned with the problems giving rise to its introduction is evidenced by the variety and range of interest appearing and testifying, and by the thoughtfulness of their presentation.
>
> "An apparent desire to obtain constructive legislation has motivated the most active parties and groups to confer, since the hearings, to arrive at language acceptable to them, and to communicate to the Sub-Committee through their spokesmen

their views and their proposed language. The language thus arrived at has been submitted also to the Interstate Commerce Commission, and we have been officially notified of the Commission's approval thereof. It appears to your Committee that the major defects in the present Statute would be corrected by the new language, and the major objectives of S. 1384, as introduced, would achieve *without unduly restricting contract carriage.*" (Emphasis supplied.)

The Report is speaking, of course, of S. 1384 as proposed to be amended by the Committee, deleting the objectionable features of Sections 1 and 2 thereof pointed out, *supra.* The proposed amendments to S. 1384 are then set out in the Report. They strike from S. 1384 as introduced the features to which the contract carriers and their representatives had objected, under which the Commission would have been granted authority to deny applications for contract carrier permits upon those bases.

The House of Representatives issued its Report No. 970 to accompany H. R. 8825, this bill being identical to S. 1384 as enacted. The Report, in stating the purpose of the proposed legislation, makes no mention of any intention to permit the Commission to deny a contract carrier application upon the ground that common carrier service is allegedly available.

In support of our statement heretofore made that the legislation enacted was compromise legislation, the compromise, insofar as here pertinent, being in striking from the bills "and not provided by common carriers" and "that existing common carriers are unwilling or unable to provide the type of service for

which a need has been shown," and "special" we refer to page 2 of House Report No. 970 as follows:

> "Hearings were held on H. R. 8825 by the Transportation and Communications Subcommittee of this committee on July 23, 1957. A predecessor bill, H. R. 5123, was introduced *at the request of the Interstate Commerce Commission to implement its Legislative recommendation No. 6 contained in its Seventieth Annual Report to the Congress.* The latter bill was not satisfactory to various groups affected by this legislation. Further conferences were held among these groups and a compromise bill was prepared as a substitute for H. R. 5123." (Emphasis added.)

The legislative history clearly indicates that by enactment of S. 1384 the Congress intended it as a mandate to the Commission to effectuate the National Transportation Policy and so to administer the Act as to recognize and preserve the inherent advantages of both contract and common motor carrier service. In this connection the Committee on Interstate and Foreign Commerce of the Senate, in the concluding statement of its Report, said:

> "Common and contract carriage are unlike; the degrees of regulations applicable to them are unequal; their functions in our national transportation system are unlike. These inherent differences are such as require statutory language clearly capable of being administered and interpreted so as to properly reflect these differences."

Further, in this same connection, Senator Smathers inserted in the Congressional Record of August 8, 1957, at page 12770, a statement in explanation of the bill, where he stated that the differences between contract

and common carriers by motor vehicle are important and meaningful at law and in practical effect, and:

> "What the Committee has attempted to do, among other things, is to preserve genuine contract carriage for its proper role in our transportation economy."

The position adopted in brief by appellant Commission to the effect that the Commission voluntarily agreed to omission of the objectionable features of the amendments with a view to continuation of application of the old standards and tests is contra to the record. The record establishes that the Commission gave ground inch by inch in the face of mounting opposition, and that it never did completely acquiesce. At the sake of repetition, S. 1384, as introduced, contained three objectionable features: (1) In the proposed amendment to Section 203(a)(15), the first objectionable feature was the phraseology "for the furnishing of transportation services of a special and individual nature"; the second objectionable feature was the phraseology "and not provided by common carriers"; the objectionable feature in the proposed amendment to Section 209(b) was the phraseology "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown".

Chairman Clarke, of the Commission, in testifying before the Sub-committee (Hearings 23-24), agreed to eliminate "that existing common carriers are unwilling or unable to render the required type of service." In his testimony, he agreed to no other change in S. 1384.

At the adjournment of the hearings on May 9, 1957, Mr. Robertson, speaking for the common carrier in-

terests, (Hearings, pages 345, et seq.) also agreed to omit the "special" and the "and not provided by common carriers" objectionable features. At no time did any representative of the Commission appear before the Subcommittee and publicly state that it was the secret intention of the Commission to interpret the new legislation contrary to the obvious intent of the Senators and to the understanding and agreement of all affected parties. It is true that Chairman Clarke did, belatedly, on May 21, 1957, (Hearings 43) write a letter to the Chairman of the Subcommittee in which he agreed to omit "and not provided by common carriers", and that he went on to say in the letter, rather than by public statement:

> "These words are not necessary to carry out the purpose of the bill, and the deletion thereof is consistent with our previously expressed position, and with the standard *already provided in the bill respecting special and individualized services.*" (Emphasis added.)

It is significant that in the bill as finally enacted the "special and individualized services" feature was omitted, and substituted therefor in the amendment to Section 203(a)(15) was the phraseology *"transportation services designed to meet the distinct need of each individual customer."*

Nowhere in the legislative history of the amendments will there be found any intimation on the part of any member of Congress that the opinion of Mr. Clarke was that which was intended to be the end result of the amendments. If such had been the case, the end result could have been accomplished simply by saying that the Commission was authorized to determine the number of contracts which a contract carrier might

lawfully hold, and that otherwise the administrative criteria previously applied by the Commission were approved. It is reasonably certain, in our opinion, that had the Chairman of the Commission made the statement publicly which he made in his late-written letter, his opinion would have been denounced by the Congress in no uncertain terms. Most certainly nowhere does it appear that any representative of the contract motor carrier industry was advised of the letter and, in this connection, it is most significant that neither Senate Report No. 703, House Report No. 970, nor the Statement of Senator Smathers inserted in the Congressional Record, August 8, 1957, page 12770, give any indication of knowledge of or agreement with the *ex parte* opinion of Chairman Clarke.

ARGUMENT

(a) It is conceded that common carriers may perform specialized services and that the Commission may, to an extent, exercise discretion, but that only within the ambit of authority granted by Congress

In limine, let us assure the Court that we have no argument with the position of the Commission, discussed at such length in its report (R. 29), and argued at such length by appellants in brief, to the effect that a common carrier may perform, within the purview of its certificate of convenience and necessity, a specialized service *as a common carrier*, offering its services to the public at large, serving the public indiscriminately and rendering only those services and at the charges prescribed by its published rates and tariffs. It may not dedicate its equipment to the exclusive use of one shipper unless it is prepared, as well, to dedicate similar equipment to the exclusive use of all shippers who would avail of its services. It cannot

enter into special contracts and arrangements "for the furnishing of transportation services designed to meet the distinct need of each individual customer", but must deal with all shippers indiscriminately, and no one shipper can make a demand upon the common carrier for service which the carrier is not prepared to perform for the public at large.

There is no evidence in this record that U.S.A.C. has ever assigned motor vehicles for a continuing period of time to the exclusive use of any shipper served by it, nor that it proposes to furnish equipment for the exclusive use of the shipper supporting this application. The most that U.S.A.C. proposes in this respect is to place a modified trailer at Indianapolis, which trailer, under the provisions of the tariff of U.S.A.C. on file, would remain under the direction and control of U.S.A.C.

Neither do we have any argument with the position that in passing on applications, the Commission, to an extent, may exercise a degree of discretion, but we do vigorously insist that such discretion may be exercised *only within the ambit of the authority vested in the Commission by Congress.* Where no authority to exercise discretion exists, no discretion may be exercised, and the Commission perforce must act within the limits prescribed by Congress.

Here we have a situation where from enactment of the Act in 1935, until passage of the involved amendments in 1957, the Congress had given the Commission little to guide it in passing on contract carrier applications, either by way of definition of contract carriage or be delineation of tests to be applied in determining whether granting of the application would be consistent with the public interest. A contract car-

rier was simply a motor carrier who operated under individual contracts or agreements; the permit was to be granted if it would be consistent with the public interest. And, thus, the door was left wide-open for the Commission, in the exercise of its discretion, to run rampant in all directions in devising and applying tests to restrict contract carriage for the benefit of common carriage. In many instances, the Commission "met itself coming back"; it devised test after test, repudiated test after test, and finally went to Congress and asked for specific authority to deny contract carrier permits by application of the "specialization" test, or where the proposed service was not provided by common carriers, or where existing common carriers are unwilling or unable to provide the type of service proposed by the contract carrier. The different tests formulated, applied and rejected over the years are ably discussed in the brief of Contract Carrier Conference of American Trucking Associations, Inc.

In response to the request of the Commission for authority to deal with contract carrier applications, the Congress struck down all requests except to the extent that it invested the Commission with authority to limit the number of contracts which a carrier might hold and to impose certain limitations and restrictions not here pertinent, on the transportation to be performed.

The Congress re-defined "contract carrier" and said that such carrier was one which engages in transportation subject to the Act "under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continu-

ing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer." Section 203(a)(15) of the Act).

It provided in Section 209(b) that, other prerequisites being met, contract carriage permits *"shall be issued"* if the proposed proposed operation is found to be consistent with the public interest. And, at that point, and in view of the chaos in the industry existing over the years as a result of the Commission's formulation and application of inconsistent, unreasonable, and unlawful tests in defining what was consistent with the public interest (see *United States* v. *Contract Steel Carriers,* 350 U.S. 409.) the Congress was constrained to and did specifically instruct the Commission as to what it might consider in determining whether granting an application would be consistent with the public interest. This legislation, it must be recalled, was not requested by the Commission; the Commission wanted authority to say that it would not be consistent with the public interest to grant the permit, as a contract carrier, if a common carrier was performing the same type service, or if a common carrier averred its willingness and ability so to do. In specifically denying the request for such authority, the Congress formulated its own rules for the Commission to apply and incorporated them in the amendment to Section 209 (b) of the Act as follows:

> "In determining whether issuance of a permit will be consistent with the public interest and the National Transportation Policy declared in this Act, the Commission shall consider (1) the number of

shippers to be served by the applicant, (2) the nature of the service proposed, (3) the effect which granting the permit would have upon the services of the protesting carriers and (4) the effect which denying the permit would have upon the applicant and or its shipper and (5) the changing character of that shipper's requirements." (We have added the numerals).

The Commission in its report, and the appellants in their briefs, urge that the discretion of the Commission in determining what will be consistent with the public interest is not circumscribed by the foregoing five tests specifically prescribed by Congress, but that it may go *aliunde* these tests and apply additional tests of its own formulation. And, we respectfully present, and as was found by the court below, that is precisely what the Commission has done in the instant case and in passing on other contract carrier applications since enactment of the amendment, reverting to the position it had assumed prior to enactment of the amendments and, as a sixth test, applying the old "adequacy-willingness-ability" of common carriers test.

In our considered opinion the maxim *inclusio unius est exclusio alterius* comes into full play. Such maxim, perhaps, would not apply as to criteria not specifically considered by Congress, but here we have a situation where Congress was specifically asked for authority to permit application of this sixth test, considered same, and did not grant such authority, and we believe it to be amply clear from the legislative history of the

amendments that it was the purpose and intent of the Congress that contract motor carriage be treated as a separate and distinct mode of transportation, entitled to all the benefits of the National Transportation Policy, and that if a need was shown for contract carriage it would be immaterial whether a common carrier was authorized to perform the involved transportation as a common carrier or whether a common carrier averred its willingness and ability so to do.

The Commission, in its report, and appellants in their briefs, urge that the Commission will be unduly restricted in implementation of the National Transportation Policy if it is limited to living within the law and applying the five tests enumerated. We say, however, without fear of successful contradiction, that subsequent to the amendments of 1957, the Commission *must* live within the amended Act, and that it cannot by administrative edict frustrate the will of Congress and continue to construe and apply the law and the presumed powers of the Commission as the Commission did prior to the amendments. In *Ziffrin, Inc. v. United States*, 318 U.S. 73, Congress had amended Section 210 of the Act. This Court held that subsequent to the amendment the Commission was bound to apply the Act as amended. stating at page 78:

> "We are convinced that the Commission was required to act under the law as it existed when its order of May 29, 1941, was entered."

The court below is taken to task by appellants for holding that the Commission, itself a creation of the Congress, must be governed by the authority granted to

it by the Congress, and that it cannot formulate and apply a sixth test of its own. As this Court said, however, in *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1, 15, 80 S. Ct. 1570, in dealing with the amendments to Section 209(b):

> "This is an immaterial argument in this forum. We do not condemn the wisdom of the Commission's action. We simply say that the transportation legislation does, and that the pardoning power in this case belongs to Congress. Thus, the decision of the District Court must be reversed, because we conclude that the Commission fell into error of law."

We construe the decision of the Court in the *American Trucking Associations* case, *supra*, to mean that the Commission must live within the amendments to Sec. 209(b), and that it cannot, as it there did and has here done, apply tests *aliunde* the Act as amended.

(b) In determining whether grant of a contract carrier permit will be considered to be consistent with the public interest, it is immaterial whether a common carrier avers a willingness and ability to perform a similar transportation service as a common carrier

The court below did not say, as is urged by appellants, that the Commission could give no consideration to the existence of common carriage in determining whether grant of a contract carrier permit would be consistent with the public interest, but it is our position that it should have done so. We believe it clearly to have been the intent of Congress that what was or was not consistent with the public interest was to be determined by the application of the tests laid down by Congress, and the legislative history definitely estab-

lishes that it was the understanding of the Congress that by elimination of the features to which objection had been made by the Department of Justice, the Department of Commerce, associations representing the contract carrier industry, shippers using contract carriage service and contract carriers that the existence or non-existence of motor common carrier service or the averred willingness and ability of a motor common carrier could *not* be looked to by the Commission in determining whether a contract carrier permit should be granted. But that is precisely what the Commission has here done in interpreting and applying the law, exactly as it did prior to to the amendments of 1957.

We believe it to be clear from the legislative history of the amendments that the Congress did not intend for the Commission to be empowered to deny contract carrier applications upon the ground that the proposed service was provided by common carriers (Congress deleted "and not provided by common carriers" from the amendment to Section 203(a)(15) suggested by the Commission), and that the Commission may not deny a contract carrier permit upon the ground of failure of the applicant to show "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown", which language was deleted from the amendments to Section 209 (b) suggested by the Commission, and the five enumerated tests substituted therefor.

Obviously, in the light of the deletions above, and in the light of the legislative history set out at length *supra*, Congress did not intend for the existence or non-existence of common carrier service, as such, to be a determinative factor with respect to contract carrier

applications, a need having been shown for contract carriage.

We respectfully present that had it been the intent of Congress simply to remedy the situation as to the number of contracts which could be held by contract carriers, this being the position taken by appellants in brief, then the Congress logically would have enacted only the concluding portion of the amendment to Section 209 (b) as follows:

> "The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service . . ."

But this the Congress *did not do*; it amended 203(a)(15) to redefine contract carriage, and it further amended Section 209(b) to set out the tests which were to be applied in determining consistency with the public interest. And, we respectfully present, that only by ignoring the intent of Congress as reflected by these portions of the amendments, and adopting the view of appellants that the sole purpose of the amendments was to limit the number of contracts which a contract carrier might hold, can the position of appellants be sustained and the action of the Commission, as reflected by its report, be approved.

(c) Contract motor carriage is a separate mode of transportation and, as such, entitled to the protection of the National Transportation Policy

We believe contract motor carriage to be a separate mode of transportation, and that as such it is entitled to the benefit and protection of the National Transportation Policy and that it is incumbent upon the Commission to so administer the Act as to retain the inherent advantages incident to contract motor carriage. In order, however, to avoid the duty upon it resting, the Commission, in refusing to grant to contract motor carriage the benefit of "fair and impartial regulation" and in refusing "to recognize and preserve the inherent advantages" of contract motor carriage says:

> "Contract and common carriage by motor vehicle are not separate modes of transportation but rather are subdivisions of the same mode, that is, motor transportation." (R. 49).

And this, we submit, directly in the face of the fact that since Congress first undertook regulation of the motor carrier industry by enactment of the Motor Carrier Act of 1935, Congress has specifically recognized and defined contract motor carriage as a separate mode of transportation, and throughout the years has dealt with contract motor carriage as a separate mode of transportation. The amendments of 1957 even more clearly point up the fact that it was the intent of Congress that contract motor carriage be considered a separate mode of transportation, and entitled to the benefit of protection under the National Transportation Policy. The only thing the two types carriage have in common is that they use trucks and operate over the highways. In every other respect, they are separate, distinct, and different modes of transporta-

tion. In the Act, itself, you begin with the definitions "Section 203(a)(14)(15); a common carrier operates under a certificate of convenience and necessity which can be obtained only upon a showing that the present or future public convenience and necessity require such transportation, whereas a contract carrier operates under a permit, with contracts with individual shippers, which permit is obtained upon a showing that the transportation is consistent with the public interest; the limitations and restrictions upon the two modes of transportation prescribed by the Act are different, and the regulation of the two modes by rules promulgated by the Commission is essentially different.

We readily agree with the Commission and appellants, that the only way in which the Commission can avoid the impact of the National Transportation Policy with respect to contract motor carriage is to say that such is not protected thereunder because *it is not a mode of transportation,* but is a "subdivision of the same mode." Carried to its ultimate conclusion, this position means, of course, simply that the Commission believes that contract motor carriage is not entitled to the benefit of the "fair and impartial regulation" required by the National Transportation Policy for "all modes of transportation subject to the provisions of this Act", and that the Commission is under no duty so to administer the Act "as to recognize and preserve the inherent advantages of each" insofar as contract carriage is concerned. In other words, the Commission says the contract motor carrier industry is a subdivision of a mode and, as such, is entitled to no recognition and no protection under the National Transportation Policy as enunciated by Congress. Such statement, in our opinion, fairly summarizes the

position of the Commission and of appellants in this case, and demonstrates the unlawfulness thereof.

Permeating the report of the Commission, as well as the briefs of appellants, is that very distinct theory that in construction and application of the Act, the Commission may permit a common carrier to perform contract carrier service as it would permit U.S.C.A. to do in the case at bar, but that when it comes to determining whether a contract carrier permit will be granted, it may devise and apply any test which it may conceive to deny a contract carrier permit for the benefit of motor common carriage.

Throughout the hearings on S. 1384, contract carriage was referred as a different mode of transportation—see the testimony of Mr. Earle O. Oren and his interrogation by Senator Purtell at page 186 of Hearings. And as to the treatment of contract carriers over the years, at the hands of the Commission, a representative of the industry at page 183 of Hearings testified:

> "Although the traditional difference between common and contract carriers has been this matter of a general holding out to serve the public as against a special service rendered to particular businesses, the Interstate Commerce Commission over the years has also built up a series of precedents in which it is held that contract carriers must be specialized as well as limited to serving individual shippers. And we have been limited. We have been limited by interpretations, by rules, by regulations, until today we can haul one way without compensation for return, and we can haul only special commodities, and we must haul them according to their intended use, and it is getting to be a problem to know when you are in business legally and when you are not in business legally."

In anticipation of just exactly what has occurred in the case at bar, the witness said, with respect to the import of S. 1384 before it was amended, Hearings page 185:

> "So this legislation will permit contract carriers to pioneer in new and specialized fields, and then permit the common carriers to move into the fields as soon as they become profitable, and oust the contract carriers simply by offering the same service. In the light of the attitude of the ICC in the past, there can be no question that the ICC will in such circumstances force contract carriers to withdraw as soon as common carriers decide they wish to offer any particular kind of service."

And then, in response to further questions by Senator Purtel, the evidence heard by the Senators with respect to S. 1384, before amendment, as appears at Hearings page 188, is as follows:

> "To begin with, this legislation is inconsistent with the National Transportation Policy declared by Congress in 1940. In the Act of September 18, 1940, Congress declared the National Transportation Policy to be to provide for 'fair and impartial regulation of all modes of transportation' in order 'to recognize and preserve the inherent advantages of each' and 'to promote safe, adequate, economical and efficient service'.
>
> "I believe that the proposed legislation is inconsistent with each of these objectives. In effect, the proposed legislation would legislate contract carriers out of existence rather than provide a fair and impartial regulation of all modes of transportation. It would fail to recognize and would destroy rather than preserve the inherent advantages of contract carriage. Furthermore, it would promote uneconomical and inefficient service by

limiting or eliminating one important mode of transportation by reducing the present limited amount of competition in the field and by encouraging higher costs in rates rather than lower. In this connection, I call attention to the report of the Senate's Small Business Committee, 84th Congress, 2d Session, Senate Report 1693, which severely criticizes the ICC for the restrictive policies which it has followed, and calls for increased competition and lifting of restrictions in the transportation field rather than a tightening of restrictions."

And in the light of the testimony above, such being representative of the great mass of similar testimony, the Congress did continue to recognize contract motor carriage as a mode of transportation, and refused to enact legislation requested by the Commission which would have permitted the Commission to further favor common carriers over contract carriers in their efforts to obtain authority to serve the public, but in the case at bar the Commission has ignored the mandate of Congress and has continued to apply the tests it formulated under the law as it existed before the amendments of 1957.

(d) The Reports of the Commission and the Opinion of the Court below

The first report of the Commission, Division 1, was handed down on January 31, 1958, (R. 22). Petitions for reconsideration were denied on July 25, 1958, (R. 28). In the first report, no mention whatsoever was made of the amendments to Sections 203(a)(15) or 209(b) of the Act, and the contract carrier application was denied upon the basis of the finding that (R. 26):

> *"The burden is upon an applicant seeking contract carrier authority, as well as one seeking common carrier authority, to establish, among other things, that there is a need for the service proposed which existing carriers cannot or will not meet."* (Emphasis supplied.)

The Commission then cites previous decisions by it in which, prior to the amendments of 1957, the "willingness and ability" of common carriers test had been applied in passing on contract carrier applications.

As pointed out, *supra*, J - T challenged validity of the foregoing order of the Commission by action instituted in the United States District Court for the Western District of Missouri on August 18, 1958, following which the Commission reopened the proceeding for consideration upon the present record, held same under advisement until June 25, 1959, and then handed down a further report (R. 29) which, in our opinion, constitutes nothing more nor less than an abortive attempt on the part of the Commission to justify its continuing application of the "willingness and ability" test, as well as imposition upon contract carrier applicants of the burden of showing that common carriers are unable or unwilling to perform the proposed transportation. The first report (R. 26) was not repealed, and the theory thereof permeates the more elaborate report (R. 29).

The Commission (R. 45) concedes that the operations proposed come within the new definition of contract carriage, i.e., they will be performed under contract, vehicles will be assigned for a continuing period of time to the exclusive use of each person served, and the carrier will furnish services designed to meet the distinct need of each individual customer.

At R. 37, *et seq.*, the Commission establishes that prior to the amendments of 1957, in each instance where a contract carrier application was opposed by a common carrier the burden was upon the applicant to establish that existing common carriers could not satisfactorily meet the reasonable transportation requirements of the shipper or shippers supporting the application and, at R. 38, says:

> "For many years this principle has been followed in disposing of applications for contract carrier permits opposed by common carriers, the decisive factor being whether the available common carrier service was reasonably adequate to meet the transportation needs involved."

At R. 41, the Commission indicates its belief that Congress did not intend or even contemplate "the abandonment of our long-continued practice", and at R. 43, the Commission establishes that subsequent to the amendments of 1957, it has persisted in denying contract carrier applications where the applicant has failed to assume and carry the burden of proof of showing that common carriers were unable or unwilling to provide the proposed service as common carriers.

Such a burden was placed squarely upon the applicant in this proceeding in that the Commission at R. 47 says:

> "... We cannot find that existing service has been shown to be inadequate."

This, we respectfully present, is precisely the burden which Congress indicated the contract carrier applicant should neither be required to assume nor carry.

In dealing with the five tests contained in Section 209 (b), the Commission concedes (R. 45) that the

applicant meets tests Nos. 1 and 2; with respect to test No. 3, the effect which a grant of authority would have upon the services of protesting carriers, the Commission concludes (R. 46) upon the basis of its finding at R. 42:

> "There is, in effect, a *presumption* that the services of existing carriers will be adversely affected by a loss of *potential* traffic, even if they may not have handled it before."

The Commission then holds that a grant of authority to applicant would have an adverse effect upon U.S.A.C. We say, without fear of successful contradiction, that there is not one iota of evidence in the record as to what effect, if any, granting of the application would would have upon U.S.A.C.

In dealing with test No. 4 (R. 46) the Commission says that "whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements", with no consideration whatsoever being given to whether the services available are designed to meet the distinct need of the shipper. In finding that the available services of U.S.A.C. are "adequate" the Commission does so upon the basis that U.S.A.C. has transported airplane parts for other manufacturers—with no evidence of record as to the requirements of the shippers heretofore served by U.S.A.C. or as to the distinct needs of those shippers, in comparison with the established distinct needs of the shipper supporting the application.

At page 47, the Commission makes this statement:

> "Furthermore, it [U.S.A.C.] is willing to dedicate certain of its trailers to the exclusive use of each of the shippers."

With all the force at our command we challenge the accuracy of the foregoing statement. It is not supported by the record.

In disposing of test No. 5, (R. 47-48), the Commission construes this test to apply only if there is a change in the shipper's requirements which would necessitate acquisition of additional operating authority. Such, we present, does violence to the obvious intent of this test which was designed to afford a shipper a flexible transportation service which could easily be adapted to change in characteristics and specifications of commodities, production schedules, etc.

The report of the Commission, as are the briefs of appellants, is permeated with the old theory of "adequacy" of common carrier service and "willingness and ability" of common carriers, with the burden to be upon the contract carrier applicant to negative the existence of "adequate" common carrier service, the position of the common carrier being buttressed by the presumption in which the Commission indulges to the effect that a common carrier will be adversely affected by the grant of a contract carrier application even though it has never participated in handling of the involved traffic or has any assurance that it will ever participate in the handling thereof. It is of significance that neither the report of the Commission nor the briefs of appellants make any reference whatsoever into the uncontradicted fact that applicant proposes a service "designed to meet the distinct need" of the supporting shipper, nor to the legislative history of the amendments which clearly indicate the intent of Congress to relieve the contract carrier applicant of the burden of proof with which the Commission had onerated it.

Insofar as the opinion of the Court below is concerned (R. 160), we feel that we would be "gilding the lily" should we be so presumptuous as to endeavor to elaborate thereon. The opinion was obviously most carefully and painstakingly prepared. It considers the facts as found by the Commission, reviews the action of the Commission in dealing with contract carrier applications before the amendments of 1957, the legislative history of the amendments, the reports of the Commission subsequent to the amendments, and comprehensively considers and determines questions of law presented. The opinion speaks for itself and we have no inclination other than to be governed thereby, and to urge that it should be affirmed.

The appellants take the Court below to task for allegedly usurping functions of the Commission in passing on questions of fact. Such, in our judgment, is not the case, but, as this Court said in *Schaffer Transportation Company* v. *United States*, 355 U.S. 83, 88:

> "Just as we would over-step our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress."

(e) Authorities

Our research discloses only two reported cases dealing with the 1957 amendments to Sections 203(a)(15) and 209(b) of the Act. In *Elvin L. Reddish v. Interstate Commerce Commission, et al.*, 188 F. Supp. 160, the United States District Court for the Western District of Arkansas held invalid an order of the Commission denying an application for a contract carrier permit upon the ground that common carriers averred

a willingness and ability to perform the proposed transportation, and upon the authority of its report in the case at bar. The three-judge court for the Western District of Arkansas cited with approval the opinion of the Court for the Western District of Missouri in the case at bar and overruled the Commission. Such case is now pending on appeal before this Court at this term in Nos. 49, 53 and 54.

In *American Trucking Associations, Inc.* v. *United States,* 364 U.S. 1, 80 S. Ct. 1570, the action of the Commission in refusing to impose normal restrictions upon contract carrier permits to a contract motor carrier owned by a railroad was challenged.

As said at 364 U.S. 1, 14:

> "The Commission assigned but a single reason for not imposing the normal restrictions upon the Pacific Motor permits: to do so would compel Pacific Motor to conduct a common carrier service. Appellees support this decision upon the ground that the Commission is without authority under Section 209(b) to impose such character-destroying conditions upon a contract carrier permit."

In footnote 9, the Court quotes Section 209(b), italicizing the amendment thereto of 1957, with this comment:

> "The italicized portion was added by an amendment of August 22, 1957, 71 Stat. 411, well before the Commission's decision of September 9, 1958. Consequently, the Commission was required to apply the new standards. *Ziffrin, Inc.* v. *United States,* 318 U.S. 73, 78, 63 S. Ct. 465, 468, 87 L. ed. 621."

At page 15, the Court observed:

> "We do not condemn the wisdom of the Commission's action. We simply say that the transpor-

tation legislation does, and that the pardoning power in this case belongs to Congress."

With respect to the plethora of opinions of the courts and reports of the Commission cited by appellants in brief, we respectfully present that substantially all thereof are either not in point or have been superseded by subsequent legislation. Insofar as the reports of the Commission are concerned, while over the years they have been inconsistent in the application of tests to be applied in denying contract carrier permits, we deem it to be immaterial whether prior to the amendments of 1957, when the Commission had no yard-stick to guide it in determining what would be consistent with the public interest, it frequently imposed upon a contract carrier applicant the burden of showing that no common carrier service was available, able or willing to perform the proposed transportation. Reports of the Commission subsequent to the amendments of 1957, also so holding, predicated upon the same grounds as the report in the case at bar, constitute nothing more nor less than an effort by the Commission to pull itself up by its own boot-straps, and such reports will either stand or fall depending upon the decision of the Court in this case.[3]

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[3] Apparently since the opinion of the lower Court was handed down in the case at bar, followed by the opinion of the Court in *Reddish* v. *Interstate Commerce Commission, et al.*, 188 F. Supp. 160, the Commission has recognized its error in applying the "willingness and ability" of common carriers test in passing on contract carrier applications, and has conceded that it is limited to applying the five tests set forth in Section 209(b) of the Act. See, for example, the decision of the full Commission in *Tam Fertilizer Carriers, Inc.,—Contract Carrier Application*, No. MC-117568 (December, 1960) 84 MCC 56, and the report of Division 1 of the Commission in No. MC-119898, *W. G. McCarty—Contract Carrier Application* (May 31, 1961), not yet reported.

With respect to the opinions of the Courts prior to the amendments of 1957, approving actions of the Commission in denying contract carrier permits, such opinions were handed down when the door was wide open to the Commission to apply tests of its own choosing in determining what would or would not be consistent with the public interest and, in the absence of legislative restriction, the courts were justified in recognizing and approving the exercise of administrative discretion by the Commission. In the light of the amendments of 1957, such opinions are beside the point insofar as determination of the issues in the instant cause are concerned.

A number of court opinions dealing with finance applications under Section 5 of the Act are cited. They are beside the point. There the standard for approval was whether consummation of the transaction would be consistent with the public interest, with no yardstick to guide or limit the Commission, and there, as well, in each instance and in each case cited, the proposed transaction contemplated the extension of a new *common carrier service* into a territory already adequately served by *common carrier service,* and no question of contract carrier service was involved. Such statement applies, as well, to the numerous cases cited dealing with questions under other acts as to what will and will not be considered to be "consistent with the public interest."

There are cited, as well, a number of cases where contract carrier applications for permits to transport *passengers* were denied in the face of opposition by common carriers, but here it should be recalled that common carriers under the terms of Section 208(c) of the Act *can and do perform a contract carrier service*

in the transportation of passengers, and the contract carriers in those cases were not rebuffed because of the existence of common carrier authority to transport passengers as common carriers, but because of the existence, willingness and ability of such carriers to transport passengers *as contract carriers.*

We will refer, however, briefly to the decisions which the Commission and the appellants deem to be of particular pertinence in this litigation. Reference is made to *Schaffer Transportation Company* v. *United States,* 355 U.S. 83, 78 S. Ct. 173. There the Commission had denied the application of a common carrier to provide service between points then served exclusively by rail, upon the basis that rail service was "reasonably adequate" to meet the transportation requirements of the shipper. The Court held that the National Transportation Policy, formulated by Congress, is the yardstick by which the correctness of the Interstate Commerce Commission's actions will be measured, and ruled that the Commission had failed to evaluate the "inherent advantages" of the motor service proposed. It is our judgment that in the case at bar, the Commission has failed to evaluate the "inherent advantages" of the contract motor carrier service proposed and that in no sense does the *Schaffer* case support the position of appellants.

Reference is then made by appellants to *American Trucking Associations, Inc., et al* v. *United States, et al.,* 344 U.S. 298, 73 S. Ct. 307. There the court had under consideration the authority of the Commission to promulgate rules regulating leasing of equipment by certificated carriers and interchange of equipment with other certificated carriers. The court held that under the Act and the rule-making and regulatory powers

thereby specifically vested in the Commission the Commission had authority to promulgate the rules in question. In contra-distinction to the case at bar, the Commission had acted within the scope of its authority contained in the Act, and it had not applied to Congress for an extension of authority and been rebuffed, as is here the case, and then persisted in the exercise of authority denied to it by the Congress.

The Commission in its report, and the appellants in brief, rely on the opinion of the court in *Wilson Bros. v. United States of America, et al.*, (W.D. Mo. 1953) 114 F. Supp. 814. Such decision does not appear to be material to the issues in the case at bar. The opinion was handed down in 1953, at which time the statutory definition of "contract carrier" was broad and, insofar as here pertinent, there was no definition of what would be considered to be consistent with the public interest. Neither was there any limitation on the exercise of discretion by the Commission in defining issues determinative of granting or denying an application for a contract carrier permit. In such case no question of statutory construction was before the court; no question of legislative history of any Act was considered; the definition of contract carrier then extant has now been amended, and the five tests prescribed by Congress in 1957 had not then been imposed upon the Commission. It appears, therefore, that insofar as the instant case is concerned, the *Wilson* case, *supra*, is authority only for the proposition that the court will examine the evidence to determine whether the Commission has ignored substantial and material evidence, and whether the findings of the Commission are supported by or are *contra* to substantial evidence.

Another case relied upon by the Commission and the appellants is that of *Bass* v. *United States of America*, 163 F. Supp. 1 (W.D. Va., 1958), affirmed 358 U.S. 333, rehearing denied 359 U.S. 956. There, as here, the United States and the Interstate Commerce Commission took the position that contract motor carriage was not a mode of transportation and, therefore, was not entitled to the benefit of the National Transportation Policy. The defendants in the court below could not persuade the court that such position was sound.

While at first blush the decision in the *Bass* case, *supra*, might appear to be *contra* to the position assumed herein by J - T, a careful examination of the opinion will establish that such is not the case. There is no indication in the opinion that the applicant in that case proposed a service "designed to meet the distinct need of each individual customer"; further, it does not appear that the attention of the court was directed to the legislative history of the amendments of 1957, nor to the five tests prescribed by Congress to be applied by the Commission in passing on contract carrier applications. It appears, on the other hand, that the law applied by the court in deciding such case was that existing before the amendments of 1957, and that upon the issue of whether contract carriage is a mode of transportation, the Court supported the position of *Bass* in that it refused to accept the position of defendants, United States and Commission, that contract motor carriage was not a mode of transportation entitled to fair and impartial regulation in administration of the Act by the Commission.

And while appellants, in brief, interpret the decision in the *Bass* case, *supra*, as holding that a con-

tract carrier permit will be denied where common carrier service is available, we respectfully present that such was not the decision of the court. The common carriers who oppose the Bass application were *carriers of passengers;* under Section 208(.) of the Act, they were engaged, as *contract carriers,* in transporting passengers and were providing precisely the same service as that proposed to be performed by *Bass.* In other words, there was no conflict between common and contract carriage, but it was simply a proposition of one contract carrier attempting to invade a field already occupied by another contract carrier service. The decision in the *Bass* case has no bearing on the case at bar.

Reference is made in brief and appellants rely upon the opinions in *Ratner* v. *United States,* 162 F. Supp. 518, 519 (S. D. Ill. 1957), affirmed 356 U.S. 368; *Herrin Transportation Company* v. *United States,* 108 F. Supp. 89, 94-95 (E. D. La. 1952), affirmed 344 U.S. 925, rehearing denied 345 U.S. 914; *Houff Transfer, Inc.* v. *United States,* 105 F. Supp. 851, 855 (W. D. Va. 1952); *Shein* v. *United States,* 102 F. Supp. 320, 326 (D.N.J. 1951), affirmed 343 U.S. 944. It is respectfully presented that neither of these cases have a remote bearing on the issues in the case at bar. In each instance they involved finance applications in which *motor common carriers* sought to acquire the operating rights of *other motor common carriers* and control such operations under Section 5 (2) of the Act. In each case, one *common carrier* was seeking to extend its operations by purchase and control into a territory already served by other *common carriers.* The only yardstick in the Act by which the Commission was to be guided was the requirement

that the proposed transaction be found to be consistent with the public interest, with no delineation of any test to be applied in determining whether such transaction would be consistent with the public interest. As we have said, the door was wide open for the Commission to exercise its discretion in granting or denying the applications and the courts, in the absence of a finding of abuse of discretion, were perforce constrained to approve the action of the Commission where, in the cases cited, the Commission had made adequate findings based upon substantial evidence. The cited cases are simply not in point insofar as the litigation at bar is concerned.

In the next place appellants cite and rely on the unreported decision in *Alexandria, Barcroft and Washington Transit Company* v. *United States* (E.D. Va., 1961) 14 F.C.C. section 81,395. Here the court had before it the question of whether the transportation of passengers by common carrier under section 208(*c*) was common or contract carriage when performed by a common carrier over its regular routes. The court held that the transportation of passengers by a common carrier under contracts over its regular routes was service permitted to be performed by a common carrier under section 208(*c*), and such being the only issue before the Court, the observations of the court with respect to matters not in issue are *obliter dicta*. At any rate, the court did not have before it for consideration the amendments of 1957 nor any of the issues which are presented in the instant litigation.

The next case cited and relied upon by appellants is *Doyle Transfer Company* v. *United States*, 45 F. Supp. 691 (D.D.C. 1942). There an order of the Commission denying a "grandfather" application was under

attack. The Commission, in denying the application, had applied the "specialization" test then in its favor. The opinion in such case has no bearing on the issues in the litigation at bar, but it is of significance in showing the error of the statement of appellants in brief that the Commission, through the years, had uniformly applied the "willingness and ability" of common carriers test in passing on contract carrier applications.

The "specialization" test was in favor with the Commission when the Doyle application was denied.

All other cases cited and relied upon by appellants are, we respectfully present, either cases dealing with common carrier applications where a common carrier seeks to invade a territory already being served by other common carriers, or finance cases where the same situation obtains and where there is no criterion to guide the Commission in determining what will be consistent with the public interest, or cases involving the performance of contract carrier service by motor common carriers in the transportation of passengers under section 208(c), and merit no further discussion or consideration.

(f) Summary and Conclusion

We respectfully submit, from the record, we have demonstrated peradventure of a doubt that the Commission had acted unlawfully and without authority in the premises, and that the judgment of the lower court should be affirmed.

We are met, of course, with the plea on the part of appellants that the Commission, as a body of experts, is entitled to exercise its expertise and discretion in passing on applications for contract carrier permits. We challenge the authority of the Commission so to do.

Discretion may be lawfully exercised by the Commission only to the extent that exercise thereof is permitted by the Congress. From the legislative history of the 1957 amendments to the Act, it is clear that the Commission is completely devoid of authority to deny a contract carrier's application for a permit, all other prerequisites being met, solely upon the ground that a common carrier avers its willingness to attempt to perform, as a *common carrier,* the transportation service for which a need for *contract carrier* service has been shown. That, however, is precisely what the Commission has done in the case at bar.

The Commission went to the Congress and requested specific authority to deny contract carrier applications either on the ground of the "specialization" test, or on the ground that the applicant was not a contract carrier if the proposed transportation was provided by common carriers, or in the absence of a showing that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown. It made these recommendations in both its 69th and 70th reports to the Congress, and it incorporated them in bills and resolutions submitted to the first session of the 85th Congress. Congress refused to grant the requested authority; it refused to onerate applicants for contract carrier permits with the burden of showing that common carriers, as such, were unable or willing to provide the proposed service; the Congress substituted its own language for the proposed amendment to section 203(a)(15) and said that a contract carrier was one who performed a service under contracts "(a) for the furnishing of transportation services through the assignment of

motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer".

And, whereas, theretofore, the Commission had had a free hand in determining what it might deem to be consistent with the public interest, the Congress laid down five tests to be applied by the Commission in determining whether grant of contract carrier permits would be consistent with the public interest. It repudiated all other tests suggested by the Commission.

Here, however, you have a report of the Commission, not repudiating but repeating and elaborating upon a previous report on the same record holding that the application is denied for the sole reason that the applicant for contract carrier authority has not assumed and carried the burden of showing that common carriers cannot or will not, as common carriers perform the involved transportation. We are confronted with a report which is permeated with the outlawed "adequacy" or "willingness and ability" of common carriers to perform the same type of service. We are confronted with a report which makes no mention whatsoever of the new definition of contract carriage or the service which the applicant for a contract carrier permit proposes to perform for the furnishing of transportation services designed to meet the distinct need of the supporting shipper. We are confronted with a report which states that the opposing common carrier proposes to dedicate equipment to the exclusive use of the shipper, which statement is not supported by the record.

We are also confronted with a report based upon a *presumption* indulged in by the Commission to

the effect that a protesting common carrier will be adversely affected by grant of the permit even though there is no evidence to support such statement, and in the face of the fact that it is established of record that the protesting carrier has never participated in the involved traffic, and there is no indication of record that it will ever participate therein.

As was held by the court below, the application of J - T was denied by the Commission by the application of a sixth test not authorized by Congress and, we say, by reverting to the construction and application of the Act as it existed prior to the amendments of 1957 and the tests of the Commission conceived thereunder, and by the Commission affirmatively ignoring the amendments of 1957.

Should the position of the Commission be sustained, the practical effect will be nothing more nor less than the emasculation of the contract motor carrier industry, which industry is an essential and integral part of the national transportation system. As appears at page 54 of Hearings, at the time the proposed amendments to the Act were under consideration by Congress, there were 2304 contract motor carriers holding permits from the Commission, serving thousands of shippers having a need for the specialized service provided by such carriers. The Commission says that contract motor carriage is not a mode of transportation which it is required to protect under the National Transportation Policy. The Congress says otherwise. If the Commission is correct in its position, from here henceforth no contract motor carrier will be granted a permit to begin or expand its operations, regardless of the need for a specialized service shown

by the shipper, if a motor common carrier simply comes forward in protest and says "I have not served this shipper; I have no equipment designed to meet the specific needs of the shipper; my tariffs preclude me from designating equipment to the exclusive use and control of the shipper, but I aver my willingness to perform the transportation."

We respectfully urge that by its position and reports in the case at bar the Commission has presumed, by administrative edict, to exercise authority not granted to it by Congress, which authority the Commission had expressly sought and in its effort had been rebuffed; we present that, following its historical pattern, the Commission is seeking to create and maintain a monopoly in favor of motor common carriers; we present that the action of the Commission in the reports here attacked is arbitrary, capricious, not based on adequate findings of fact and based on self-serving conclusions and presumptions without foundation in the record, and that same ignore basic and essential elements of fact which are determinative of the issues; we present, further, that J-T has conclusively established of record that it is a contract carrier and that it has met all five of the prerequisites prescribed by Congress for issuance to it of a permit as a contract carrier, and that denial of such permit by the Commission results from destruction, by administrative edict, of the distinction between common and contract motor carriage, disregard of the express mandates of Congress as reflected by the Act, amendments thereto, and the National Transportation Policy as enunciated by Congress, and is an effort by the Commission to do indirectly by administrative edict that which Congress has expressly declined to permit it to do by direction.

The action of the Commission in denying J - T's application for a permit can, we respectfully present, receive judicial sanction only by reading into the amendments of 1957 those features which were specifically deleted by Congress, i.e., in section 1 of the amendments, (sec. 203(a)(15) of the Act) the proviso that a contract carrier by motor vehicle must be a carrier which provided a specialized service "and not provided by common carriers" and into section 2 of the amendments, (sec. 209(b) of the Act) the proviso that a permit to operate as a contract carrier would not be granted in the absence of a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown".

We respectfully submit that the judgment of the court below should be affirmed.

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